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No. 94-1328

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

LEGAL ECONOMIC EVALUATIONS, INC.;
IBAR SETTLEMENT COMPANY; and
WEIL INSURANCE AGENCY, INC.
Petitioners,
VS.
METROPOLITAN LIFE INSURANCE COMPANY, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF CONSUMER FEDERATION OF AMERICA'S INSURANCE GROUP IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Consumer Federation of America's ("CFA") Insurance Group hereby respectfully moves for leave to file the attached brief as *amicus curiae* in support of a writ of *certiorari* with respect to the first question presented for review by the petition. Pursuant to United States Supreme Court Rule 37.2, CFA's Insurance Group requested the parties' consent to its participation in this matter. Petitioners granted permission; respondents refused.

Founded in 1968 to advance the consumer interest, Consumer Federation of America ("CFA") is a nonprofit association of more than 240 national, state and local organizations with a combined membership of 50 million Americans. The Chairman of CFA is Senator Howard M. Metzenbaum, retired member of the United States Senate and former Chair of the Antitrust, Monopolies & Business Rights subcommittee of the Senate Judiciary Committee.

A nonprofit organization, the National Insurance Consumer Organization ("NICO") was founded in 1980 as the only national consumer organization exclusively devoted to analyzing and advancing various insurance issues as they affect the consumer. Both CFA and NICO have provided consumer education on insurance issues and have advocated the interest of consumers of insurance in the development of public policy before regulatory and legislative bodies and the courts.

In January of 1995, NICO merged with CFA and is now known as CFA's Insurance Group. The CFA Insurance Group's director is J. Robert Hunter, an actuary as well as the founder and former president of NICO. Mr. Hunter recently served as Insurance Administrator of the State of Texas and formerly served as Federal Insurance Administrator under Presidents Ford and Carter. Both CFA and

NICO have, over the years, received numerous complaints from consumers about insurance industry practices.

As discussed herein, consumers of annuities sold by insurance companies to fund the settlement of personal injury litigation—i.e., those people who receive annuity payouts, authorize the purchase of annuities and relinquish their personal injury claims in exchange for annuities—will continue to be denied access to information about annuity prices unless *certiorari* is granted and the Court of Appeals' decision is reversed. The insurance industry's admitted conspiracy to exclude petitioners from the market in order to prevent insurance consumers from properly evaluating the most fundamental aspect of any product — its price — is unjustifiable. Further, the efficient allocation of insurance funds for the benefit of consumers who are often severely injured and rely upon annuity payouts to provide basic health care products and services is thwarted by the insurance industry's agreement to withhold price information from the public.

Moreover, competitors (such as petitioners) were providing price information to consumers and therefore were also providing better value and increasing the volume of annuity products consumers desired. If they may be excluded from the market by a nationwide agreement of their direct suppliers and competitors, consumers will suffer greatly. Here, and in many other circumstances, consumers are unaware of the anticompetitive and anticonsumer practices of sellers unless and until aggrieved competitors such as petitioners here seek redress under the antitrust laws. In order to protect consumers, the ultimate beneficiary of our antitrust laws, competitors excluded from the market by an industrywide group boycott must be found to have suffered "antitrust injury" and have standing to enforce these laws in federal courts.

CFA's Insurance Group files this brief to bring to the Court's attention the crucial importance to consumers of

accurate information about prices and to express the insurance consumers' vital interest in reversing the decisions below. The petition does not adequately explain the critical stake of consumers. Further, CFA's Insurance Group specifically addresses how the decisions below present a potentially serious danger to all consumers if competitors who are precluded from serving those consumers by a nationwide group boycott may be denied standing to enforce the antitrust laws.

Respectfully submitted,

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I.

INTEREST OF THE *AMICUS*

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A nonprofit organization, the National Insurance Consumer Organization ("NICO") was founded in 1980 as the only national consumer organization exclusively devoted to analyzing and advancing various insurance issues as they affect the consumer. Both CFA and NICO have provided consumer education on insurance issues and have advocated the interest of consumers of insurance in the development of public policy before regulatory and legislative bodies and the courts.

In January of 1995, NICO merged with CFA and is now known as CFA's Insurance Group. The CFA Insurance Group's director is J. Robert Hunter, an actuary as well as the founder and former president of NICO. Mr. Hunter recently served as Insurance Administrator of the State of Texas and formerly served as Federal Insurance Administrator under Presidents Ford and Carter. Both CFA and NICO have, over the years, received numerous complaints from consumers about insurance industry practices. The interest of CFA's Insurance Group and the consumers it represents in the first question presented by the petition for a writ of *certiorari* herein is fully described in the Motion accompanying this Brief.

II.

SUMMARY OF ARGUMENT

The use of annuities sold by life insurance companies to settle personal injury litigation has become an important tool in this country for providing periodic payments necessary to care for the rehabilitation and health of severely injured accident victims. Annuities assist the parties in settling tort litigation and, as a result, also help to unclog our overloaded court systems. As a reflection of its significance, the structured settlement annuity market approximates $4.6 billion in annuity premiums annually. P. Hindert,

J. Dehner, P.J. Hindert, *Structured Settlements and Periodic Payment Judgments*, § 103, 1-17 (1994).

It is undisputed for purposes of this petition that virtually the entire life insurance industry and its brokers have collaborated to prevent consumers of these annuities from having access to annuity prices by boycotting those competing brokers (such as petitioners) who provided accurate price information to annuity consumers. The insurance industry claims that personal injury victims are viewed by it "not merely as adversaries, but as potential clients for financial services and products [i.e., annuities]," P. Hindert, *supra*, § 1.05-1-38. Its members nonetheless attempted to justify their conspiracy to keep consumers in the dark about annuity prices on the basis that it would benefit the large institutional casualty companies that are often defendants in personal injury litigation. Concealed annuity prices, it is explained, provide the carriers with a negotiating advantage during settlement discussions. To the detriment of the consumers of these annuities, the legal system and ultimately society at large, the insurance industry's arguments have succeeded in the courts below.

The decisions below do not dispute but simply *ignore* the substantial harm caused to the insurance industry's "client" — the American consumer — by the industry's admitted conspiracy to withhold price information. (39 F.3d at 954-955; Pet. App. A at A-5, A-7; 815 F. Supp. at 1323; Pet. App. B at A-16.) Hence the courts below allow profound harm to annuity consumers to continue unabated and their decisions create unsound precedent which legitimizes competitors' agreements to prevent consumers from having access to the most basic and critical facts regarding products sold in the market place — their price.

Moreover, the decisions below represent a further restriction upon antitrust standing which will also significantly harm all consumers. The interest of consumers is paramount in determining whether competitors have suffered "antitrust injury" at the hands of their competitors:

> The antitrust injury doctrine . . . requires every plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers. . . . Whenever producers invoke the antitrust laws *and consumers are silent*, this inquiry becomes especially pressing. [Citations omitted.] (Emphasis added.)

Chicago Pro Sports Ltd. Partnership v. NBA, 961 F.2d 667, 670 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 409 (J. Easterbrook). But consumers are *not* silent here. The insurance industry's exclusion of petitioners as competitors from the structured settlement annuity brokerage market, solely because they provided accurate price information to consumers, significantly harms annuity consumers and should be stopped.

The courts below indicated that neither consumers nor competitors could seek relief from the industry's nationwide boycott of petitioners. Unless *certiorari* is granted to correct those decisions, consumers will continue to be denied access to information which they need in order to make correct market decisions and the protection afforded consumers by the antitrust laws will be significantly eroded.

III.

ARGUMENT

A. Consumers Are Significantly Harmed By The Collusive Suppression Of Price Information By Competing Sellers

Virtually the entire life insurance industry admits the allegations of petitioners' complaint: that the industry concertedly excluded petitioners from the brokerage market only because petitioners wanted to provide accurate price information about annuity products to the ultimate consumer. This served to deny consumers — often severely injured accident victims — information that is vital to their pocketbook and personal health and which, more generally, is critical to the health of our free market economy. "Price is the central nervous system of our economy." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). This Court, in discussing the consumers' right to prescription drug prices, previously emphasized the importance of consumer access to accurate information about products which they need in order to care for their medical problems:

> As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.... Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.... Advertising,

> however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made from numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. [Citations omitted.]

Va. St. Bd. of Pharm. v. Va. Citizens Cons. Council, 425 U.S. 748, 763-766 (1976).

Here, accident victims who are unable to shop the life insurance market are hit especially hard. Moreover, the insurance industry's conspiracy thwarts the public interest in causing decisions regarding settlement annuity purchases to be distorted by misinformation. There is little dispute that consumers' pleas for adequate information about the products they need and use should be answered. *See, e.g.*, S. Breyer, *Regulation And Its Reform*, 26 (1986). Virtually all economists agree that a competitive and efficient market requires that consumers be given accurate information about competing products and prices. *See, e.g.*, R. Posner, *Regulation Of Advertising By The FTC*, 3-4 (1973); R. Pitofsky, *Beyond Nader: Consumer Protection And The Regulation Of Advertising*, 90 Harv. L. Rev. 661, 663, 670 (1977).

There is no doubt that a conspiracy between competitors to deny consumers information about annuity prices should be summarily condemned under the federal antitrust laws. *See, e.g., FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) (dentists' suppression of x-ray information from insurers was summarily declared unlawful); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) (agreement among competitors to refuse to discuss prices

with potential customers was *per se* illegal); *Fed. Prescription Service v. Am. Pharmaceutical Ass'n*, 484 F. Supp. 1195 (D.D.C. 1980), *aff'd in part*, 663 F.2d 253 (D.D.C. 1981), *cert. denied*, 455 U.S. 928 (1982) (group boycott banning advertising by competing pharmacists was *per se* unlawful); *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688 (7th Cir. 1961) (agreement between competing gasoline station operators to eliminate price advertising at the pump was *per se* illegal). "No court or commentator has yet to suggest a competitive benefit which could flow from withholding information." H. Gerla, *Federal Antitrust Law And The Flow Of Consumer Information*, 42 Syracuse L. Rev. 1029, 1032 (1991). Therefore, it would be not only ironic but also illogical and against public policy for this Court to protect the insurance industry from liability for its suppression of vital information from consumers. *See, FTC v. Indiana Federation of Dentists, supra.*

The reason that all of these courts have summarily condemned such conspiracies is plain enough: consumers suffer.

> A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal [consumer welfare] of antitrust law. Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.

National Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 107 (1984). Here, the insurance industry's boycott of petitioners so as to create a price information "blackout" for annuity consumers naturally caused a decrease in the sale of such annuities. Personal injury claimants and their attorneys are understandably reluctant to settle their claims if they are not allowed to know the price of the annuity. Removing the consumer's

ability to compare prices indisputably resulted in higher prices (less value for their claim) to consumers.[1]

It is obvious that consumers of structured settlement annuities must have accurate annuity price information available to them in order to determine the real value of their annuity. Indeed, it is both ironic and significant that the industry's treatise explains that injury claimants and their attorneys should *always evaluate the price of any financial product used to fund a periodic payment obligation.* P. Hindert, *supra*, § 5.02[2], 5-5, 5.04[1], 5-51, 52 (emphasis supplied). Although the insurance industry sometimes allowed consumers to know the "present value" of the annuity payouts over time, this figure does not provide consumers with the actual value or price of the product. By allowing consumers access to annuity prices, petitioners — before the boycott was imposed — often increased annuity payouts to consumers at the same or lower price by shopping the annuity carriers. Moreover, petitioners' significant and undisputed pre-boycott success in brokering structured settlement annuities belies the Ninth Circuit's illogical characterization of them — and consumers — as not in the relevant market (39 F.3d at 955-956; Pet. App. A at A-8-9). Also, the pre-boycott use of structured settlement annuities when both personal injury victims and tort defendants knew annuity prices demonstrates that the information blackout is not what made the product "economically attractive" to litigants (39 F.3d at 955; Pet. App. A at A-8).

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[1] Further, annuities used to fund settlements are only sold after both the personal injury claimant and the tort defendant agree to settle litigation by purchasing this insurance product. Hence settlement annuity brokers who assist insurance companies in selling these annuities are not aligned with "one side of the street" or the other. Rather, brokers must obtain the approval of "both sides of the street," personal injury victims and tort defendants, before they can sell an annuity that settles tort litigation.

The federal antitrust laws reflect Congress' judgment that "ultimately competition will produce not only lower prices, but also better goods and services." *National Soc'y of Professional Eng'rs v. United States,* 435 U.S. 679, 695 (1978). Congress thus recognized that "all elements of a bargain — quality, service, safety and durability — and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." *Id.* Here, consumers are being denied access to the various prices of annuities. The courts below have simply disregarded Congress' judgment about the importance of fair competition.

Moreover, not only are consumers left "in the dark" about critical information concerning the financial aspects of a product which they desire but some brokers knowingly misrepresented to consumers that if they received information regarding annuity prices before they formally agreed to settle their cases, they would have "constructively received" the annuity and jeopardized the tax-free status of future annuity payments. The leading industry treatise explains that since 1983 it was clear to the insurance industry that tax benefits of structured settlement annuities were not endangered by the consumer's knowledge of annuity prices. P. Hindert, *supra*, § 203[2], 2-24. This industry deception has merely served to exacerbate the harm already sustained by tort victims who truly need structured settlement annuities.

Besides the harm caused to consumers of annuities, the harm to society in general caused by the insurance industry's boycott is acute. Structured settlements provide an important tool for unclogging our courts and effectively allocating resources for the care of countless injured persons. However, structured settlements will not be optimally effective unless consumers are allowed full knowledge of annuity prices:

> Periodic payment presents an opportunity to substantially improve the traditional tort system. . . . Only if

> both sides of the litigation understand the transaction(s), keep open minds, analyze the claimant's needs, and disregard destructive myths and allusions will periodic payment reach the potential and provide the benefits of which it is ever so capable.

P. Hindert, § 1.05, 1-38. The only proffered excuse for the insurance industry's boycott was that it was not "anticompetitive" because tort defendants, mostly casualty companies, could gain a negotiating advantage in settlement discussions over personal injury victims by not disclosing all relevant facts to them. (815 F. Supp. at 1323; Pet. App. B at A-16.) That excuse runs contrary to fundamental notions of due process as well as the rules of discovery and settlement in civil litigation. See Advisory Committee Note to Former Federal Rule of Civil Procedure 26 (settlements should be based on knowledge, not speculation). By thus blindfolding the structured settlement annuity consumers during settlement negotiations, the insurance industry's price information boycott subverts justice:

> So long as the policy of the Rules is the promotion of the 'just, speedy and inexpensive' resolution of cases, then fair settlements must always be encouraged. Fairness cannot be achieved where one side is needlessly blindfolded.

Bennett v. LaPere, 112 F.R.D. 136, 141 (D.R.I. 1986). Moreover, the sale of annuities by nonparties to personal injury litigation (the life insurance companies) for the ultimate consumers' use and benefit must be regarded as commerce within the reach of the antitrust laws. *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975). Otherwise, all consumers of products or services used in connection with litigation would be provided no protection by the antitrust laws.

This Court should grant *certiorari* to address the first question presented by the petition, correct the decisions below and reaffirm that competitors may never collusively exclude competitors in order to suppress critical information—especially about prices—from consumers.

B. In Order To Protect Consumers, Petitioners Must Be Held To Have Suffered Antitrust Injury When Respondents Collusively Exclude Them From The Market Solely Because They Provided Accurate Price Information To Consumers

The insurance industry's nationwide refusal to deal with petitioners and similar brokers solely because these brokers wanted to provide accurate prices to the public constitutes unlawful exclusionary conduct precisely because consumers (as well as competitors) were significantly injured. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) ("[t]he question was whether [the defendant's] conduct may properly be characterized as exclusionary cannot properly be answered by simply considering its effect on [the plaintiff]. In addition, it is relevant to consider its impact on consumers . . ."). As discussed above, courts have consistently and summarily condemned as violations of the antitrust laws joint efforts by competitors to withhold information from the public. However, it is similarly true that, *in order to protect consumers,* competitors who are directly excluded from the market by such a conspiracy — and therefore are denied the opportunity to bring lower prices and better products to consumers — must have standing under the antitrust laws to seek redress. *See, e.g., Fed. Prescription Services, Inc. v. Am. Pharmaceutical Ass'n,* 484 F. Supp. 1195, 1707 (D.D.C. 1980) (competing pharmacists were victims of a *per se* unlawful group boycott by competitors). Thus if a dentist had attempted to defy the unlawful information blackout imposed by his competitors in *Indiana Federation Of Dentists, supra,* and was thereby

excluded from the market by those competitors, that dentist surely would have suffered antitrust injury and would therefore have standing to complain about it. Competitors like petitioners must have antitrust standing, in short, to protect and promote consumers' welfare.

The antitrust laws' ban of group boycotts against competitors is ultimately designed to protect consumers. *Rothery Storage And Van Companies v. Atlas Van Lines, Inc.*, 792 F.2d 210, 228 (D.C. Cir. 1986); *Fishman v. Estate Of Wirtz*, 807 F.2d 520, 567 (7th Cir. 1986) (J. Easterbrook dissenting), *cert. denied*, 479 U.S. 1033 (1987). Industry-wide group boycotts are unlawful because they eliminate competitors, thereby tending to usurp consumer preference and to create monopolies. *See, e.g., Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941). Here, a boycott implemented by the entire insurance industry in order to cut off competitors' access to information needed to compete — retail price information about annuities — plainly hurts consumers as well as competitors and should be summarily condemned even considering this Court's latest more penetrating review of group boycotts. *See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery And Printing Co.*, 472 U.S. 284 (1985) (boycott by those with market power is *per se* unlawful); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (agreement among competing attorneys not to provide services until prices increased was a classic *per se* unlawful restraint of trade); *See also Hartford Fire Ins. Co. v. California*, ____ U.S. ____, 113 S. Ct. 2891, 2913 (1993) (insurance boycott unlawful because it sought the joint forbearance of sales).

Hence the Ninth Circuit's holding that direct competitors harmed by a nationwide predatory agreement which also directly harms consumers have not suffered "antitrust injury" as a matter of law is clearly wrong. It perverts this

Court's decision in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). The industrywide group boycott instituted by the insurance industry against petitioners was unquestionably an "anticompetitive" aspect of the insurer's scheme precisely because it so clearly harmed consumers.

The antitrust laws are designed, most fundamentally, to protect consumers. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (Congress designed the Sherman Act as a "consumer welfare prescription"); *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 528 (1st Cir. 1989) (consumers are Sherman Act's ultimate beneficiaries); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 535-536 (7th Cir. 1986) ("We agree that the enforcement of consumer welfare is an important policy — probably the paramount policy — in forming the antitrust laws."). But if competitors who are excluded by unlawful conduct which also harms consumers are denied antitrust redress, the most effective weapon for protecting consumers — private antitrust enforcement litigation — will become virtually useless. *See, e.g., Perma Life Mufflers v. Int'l Parts Corp.*, 392 U.S. 134 (1968) ("The purpose of the antitrust laws are best served by insuring that the private action will be an ever present threat to anyone contemplating business behavior in violation of the antitrust laws."); *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965) (private antitrust litigation is "one of the surest weapons for effective enforcement of the antitrust laws."). Competitors, like petitioners here, often are the best enforcers of the antitrust laws because they first learn about anticompetitive conduct. H. Hovenkamp, *Antitrust's Protected Classes*, 88 Mich. L. Rev. 1, 31 (1989). ("Competitors are often the most efficient enforcers of the antitrust laws, for they are in a position to catch monopolistic activity much earlier than are consumers.")

Finally, the courts below already have decreed that annuity consumers do not have standing to complain under the antitrust laws. If the decisions below are not reversed so as to allow petitioners to seek antitrust redress, the insurance industry will be free to continue their plainly anticompetitive conduct with impunity. More generally, to protect all consumers, competitors who are attempting to bring efficiency to markets should not be denied antitrust standing—especially summarily—when they are the victims of the predatory actions of their competitors. If the decisions below are not reversed, the fundamental goal of our antitrust laws in promoting consumer welfare will be jeopardized.

IV.

CONCLUSION

The insurance industry's nationwide conspiracy to prevent insurance consumers from having access to annuity price information cannot be excused and therefore must be stopped. Moreover, the only way consumers can obtain protection here — and in many other cases like this — is on the backs of competitors who have been directly injured by such schemes. Unless *certiorari* is granted with regard the first question presented by the petition, the insurance industry's Sherman Act violations will continue unabated and a practice which should be summarily condemned will be officially sanctioned. On behalf of consumers, CFA's Insurance Group urges *certiorari* with respect to this important question.

Respectfully submitted,

HOWARD M. METZENBAUM
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